

## **REMARKS**

This is a full and timely response to the non-final Office Action mailed May 11, 2005. Claims 29 – 56 remain pending. No amendments have been made. Applicants should not be presumed to agree with any statements made by the Examiner in the Office Action unless otherwise specifically indicated by the Applicants. Reconsideration and allowance of the application and presently pending claims are respectfully requested.

### **I. Examiner Interview**

Applicants thank Examiner Cardone for the time spent with Applicants' attorney, Christopher Guinn, during a telephone discussion on June 2, 2005 to discuss the non-statutory double-patenting rejection of claims 29 – 39, 41 – 42, and 48 – 56. Specifically, the non-applicability of the *Donoho* reference with respect to claims 29 – 39, 41 – 42, and 48 – 56 of the instant application was discussed. During the discussion it was apparently agreed that claims 29 – 39, 41 – 42, and 48 – 56 are not anticipated by *Donoho*. Rather, it was clarified by Examiner Cardone that the Office Action should have rejected claims 29 – 39, 41 – 42, and 48 – 56 as allegedly being unpatentable over claims 1 – 5 and 9 - 18 of U.S. Patent Number 6,230,203 B1 to Koperda, *et al.* ("*Koperda*").

### **II. Double-Patenting Rejection of Claims 29 – 39, 41 – 42, and 48 – 56**

The Office Action indicates that claims 29 – 39, 41 – 42, and 48 – 56 stand rejected under the (non-statutory) judicially created doctrine of obviousness-type double patenting as being allegedly unpatentable over claims 1 – 5 and 9 - 18 of U.S. Patent Number 6,263,362 to Donoho, *et al.* ("*Donoho*").

However, as resolved in the telephone discussion of June 2, 2005, as explained above, the Office Action should have rejected claims 29 – 39, 41 – 42, and 48 – 56 as allegedly being unpatentable over claims 1 – 5 and 9 – 18 of *Koperda*.

Accordingly, in response to the double patenting rejection and the further clarification by Examiner Cardone, Applicants submit a terminal disclaimer pursuant to 37 C.F.R. §1.321(c). Applicants have submitted the terminal disclaimer solely to advance prosecution, without conceding that the double patenting rejection is properly based. In filing the terminal disclaimer, Applicants rely upon the ruling of the Federal Circuit that the filing of such a terminal disclaimer does not act as an admission, acquiescence, or estoppel on the merits of the obviousness issue. *Quad Environmental Tech v. Union Sanitary Dist.*, 946 F.2d 870, 874-875 (Fed. Cir. 1991).

### **III. Double-Patenting Rejection of Claims 40 and 43 – 47**

The Office Action rejected claims 40 and 43 – 47 under 35 U.S.C. §101 as allegedly claiming the same invention as that of claims 1 – 5 of *Koperda*. Applicants respectfully traverse this rejection.

A statutory-type double patenting rejection is proper only when the alleged conflicting claims are coextensive in scope. To be co-extensive in scope, the language must be identical. Each of the respective independent claims have been set forth below in the table for direct comparison. For convenience, the undersigned has underlined areas of difference.

Claim 40 of Present Application	Claim 1 of <i>Koperda</i>
<p>40. A system comprising:  a network control computer for <u>detecting parametric data related to an originated communication from a network access device</u>; and  a link access controller <u>for policing a connection of the network access device to assure an authorized level of service for the network access device</u>, the authorized level of service <u>comprising at least a maximum bandwidth or data bit rate over a shared upstream channel</u>.</p>	<p>1. A system <u>for providing parametric statistics related to a level of service comprising at least a maximum bandwidth or data bit rate over a shared channel</u> comprises  a link access controller <u>coupled to a plurality of network access devices</u>, the link access controller <u>for supervising a connection and denying service if requested bandwidth or bit rate by a coupled network access device exceeds a maximum bandwidth or data bit rate of an authorized level of service</u> and  a network control computer for <u>collecting parametric statistics from said link access controller</u>.</p>

The undersigned acknowledges that there may be a *modicum* of commonality between the two claims, and for that reason, submits that, *at most*, an obviousness-type double-patenting rejection may be in order. However, even slight differences between the claims should prevent the application of a statutory double-patenting rejection. In this regard, the Doctrine of Claim Differentiation signifies that even minor differences in claims in the same application or patent should be presumed to cover different inventions or a different scope of the same invention. *The Laitram Corp. v. Rexnord Inc.*, 19 U.S.P.Q. 2d 1367, 1371 (Fed. Cir. 1991). However, as shown in the table above, Applicant submits that there are substantial differences between claim 40 of the present application and claim 1 of *Koperda*.

Accordingly, Applicants respectfully submit that independent claim 40 and claims 43-47 (which depend therefrom), while potentially similar to independent claim 1 and its

dependent claims 2 – 5 of *Koperda*, are not co-extensive in scope. For at least this reason, the double patenting rejection of claims 40 and 43 – 47 should be withdrawn.

Additionally, in that a terminal disclaimer is submitted herewith, even a rejection to claims 40 and 43 – 47 under the (non-statutory) judicially created doctrine of obviousness-type double patenting with respect to any of the claims of *Koperda*, is moot.

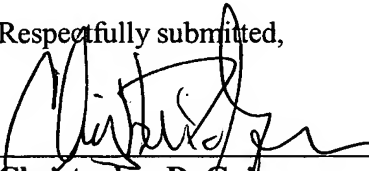
### CONCLUSION

The Applicants respectfully submit that all claims are now in condition for allowance, and request that the Examiner pass this case to issuance. If, in the opinion of the Examiner, a telephonic conference would expedite the examination of this matter, the Examiner is invited to call the undersigned attorney at (770) 933-9500.

Any other statements in the Office Action that are not explicitly addressed herein are not intended to be admitted. In addition, any and all findings of inherency are traversed as not having been shown to be necessarily present. Furthermore, any and all findings of well-known art and official notice, or statements interpreted similarly, should not be considered well known since the Office Action does not include specific factual findings predicated on sound technical and scientific reasoning to support such conclusions.

No fee is believed to be due in connection with this response. If, however, any fee is deemed to be payable, you are hereby authorized to charge any such fee to Deposit Account No. 20-0778.

Respectfully submitted,

  
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